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Supreme Court, U.S.
FILED

08-794 DEC 1 - 2008

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No. _____

In The
Supreme Court of the United States

TIBOR GASPARIK,

Petitioner,

v.

STONY BROOK UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

TIBOR GASPARIK
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INTRODUCTORY STATEMENT

The District Court of the Eastern District of New York and the Appellate Court for the Second Circuit dismissed the Petitioner's case for lack of subject matter jurisdiction, invoking Respondent's sovereign immunity based on the Eleventh Amendment of the United States Constitution.

QUESTIONS PRESENTED

1. Whether the stripping doctrine could be extended to state universities, or if it is possible to apply other legal means available, to make state universities accountable for constitutional violations of their employees' civil rights, resulting from discrimination against conservatives in hiring, retention and promotion?

2. Whether states should be required to consent to being sued in cases involving constitutional violations in order to comply with the Fourteenth Amendment?

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SUBJECT MATTER AND JURISDICTION

(a) This is a civil action for damages and injunctive relief brought pursuant to the Right to Free Speech and Freedom of Association under the First Amendment, 1 U.S.C. section 1 and 42 U.S.C. sections 1983, 1985-6. The unlawful practices alleged below have been committed within the Eastern District of New York.

(b) This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254.

(c) Petitioner commenced this action on 08/11/2005. Respondent served the answer on 09/09/2005. The case was dismissed from the District Court on 07/09/2007 (Appendix A). Notice of appeal was filed on 08/03/2007. The case was dismissed from the Court of Appeals for the Second Circuit on 10/16/2008 (Appendix B).

(d) The supporting documentation has been posted under *Links* on Petitioner's Web site: http://suny-stonybrook.blogspot.com/ .

STATEMENT OF THE FACTS

Petitioner was employed between April 1985 and January 2002 as Lab Manager and Research Associate Professor at the Department of Geosciences, Stony Brook University. He performed research at levels that could be rated among the best in the world by any standards of scholarly achievement. However, for most of his employment, he was subjected to hostile actions by his superiors, with the clear intention of

making his work difficult and life miserable and thus to force him to leave employment. When these actions failed, the Petitioner was dismissed in January 2002 under the excuse that "the project has ended." Yet despite being the most accomplished and most senior of all scientists participating in the project, he was the only one dismissed under this excuse.

For many years Petitioner searched in vain for an explanation for the startling discrepancy between his superior performance and accomplishments as a scientist and the indifferent to hostile behavior by his colleagues. Several of his colleagues devoted extraordinary amounts of time and effort to a single goal: to force the Petitioner to leave.

It has become evident since 2003 that most universities and colleges in this country discriminate against conservatives in hiring, retention and promotion. This fact is based on surveys, voter registration records, voting records and political donations, which show that conservative scholars all but disappeared from the academic community.

Petitioner has never tried to hide his conservative views, nor his record of voting for Republican candidates, but cannot name a single faculty member at the Department, or other university professor, who is not a liberal. Petitioner does not even have the option of pretending to be a liberal, because it is widely known among his peers in the scientific community that he is a refugee from

communism. Petitioner believes his political orientation is the sole reason for the discrimination against him in hiring, retention and promotion, and for the acts of persecution against him.

ARGUMENTS

The lower courts dismissed the Petitioner's case for lack of subject matter jurisdiction, thus denying the Petitioner any venue to reach justice. Petitioner understands that states and their alter egos, state universities, have been held immune from prosecution by private individuals, for example, in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984); *Dube v. State University of New York*, 900 F.2d 587,594 (2nd Cir. 1990), *Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 107 (2001), *Towers v. SUNY Stony Brook*, No. CV 04-5243(FB), 2007 WL 1470152, at *4 (E.D.N.Y. May 21, 2007), and *Banks v. SUNY at Buffalo*, No. CV 06-2392, 2007 WL 895505, at *7 (W.D.N.Y. March 22, 2007).

Therefore, Petitioner respectfully asks this Court to reconsider this precedent and extend the stripping doctrine to state universities (*Ex parte Young*, 209 U.S. 123 (1908).

Although, the stripping doctrine has been strictly applicable to lawsuits that name a state official as a party, Petitioner believes that in this case, or in similar cases involving constitutional violations of civil rights by state universities, naming an

individual as a party trivializes the issues under complaint, since individuals must follow due process and act on decisions approved by their colleagues and the institution, and thus have limited control over their actions. Petitioner named in this case all individuals responsible, including professor Donald H. Weidner, who signed the document authorizing the Petitioner's dismissal, and would be the party named in a lawsuit in strict compliance with the stripping doctrine.

Petitioner also made every effort to appeal to all individuals that should be responsible for addressing Petitioner's grievances at the Stony Brook University and should be held accountable for not doing so, including the president Dr. Shirley Strum Kenny. Therefore, the Petitioner believes that the stripping doctrine should be extended to institutions whose hiring policies violate the United States constitution. This is institutional discrimination, and the institutions should be held accountable.

The Supreme Court has long held that absent the state's express waiver or consent or Congressional abrogation, the Eleventh Amendment bars suits brought against the state by its own citizens (*Hans v. Louisiana,* 134 U.S. 1 (1890), *Fonseca v. Columbia Gas Sys.*, Inc., 37 F. Supp. 2d 214, 231 W.D.N.Y.1998). However, the record shows that the State of New York initially consented to the lawsuit. Respondent defaulted in answering Petitioner's complaint and agreed verbally to being sued in a concession made to the magistrate

judge, Arlene R Lindsay, on October 16, 2005, to avoid the default. Therefore, the dismissals by the lower courts do not have any legal basis, but are just convenient excuses to dispose of an inconvenient case. Petitioner also believes that the State of New York is legally required to consent to being sued in this case in order to avoid violating the Fourteenth Amendment of the United States Constitution.

The Appellate Court for the Second Circuit also pointed out that the Petitioner's case could not be considered under Title VII of the Civil Rights Act, because the Petitioner "failed to allege that he is a member of a class protected by the Act." Petitioner cannot exclude the possibility that the age discrimination did not play a role, since he was dismissed when aged 51, and his application for an advertised position was rejected by the Respondent when aged 56. Petitioner believes that a fair trial is necessary to establish whether the alleged discrimination falls under the protected status.

REASONS THE WRIT SHOULD BE GRANTED

Petitioner has concluded a review of most public institutions that should be responsible for addressing his grievances, and should be held accountable for not doing so. Petitioner has, so far, failed to find a single public official or institution that would be willing to address his complaint in a meaningful way, despite the fact that, since the Petitioner's dismissal from his employment, the intellectual corruption of the

academic establishment has become clearly visible. Petitioner also clearly demonstrated that the institutions of higher education do not have a functioning mechanism to address grievances, since he has searched for 20 years to find one and found only stonewalling: no one wants to see, no one wants to hear, no one wants to speak, no one wants to know.

As someone who experienced the full brunt of communist education from kindergarten through college, and lived for over 20 years among the liberals in the Academia, Petitioner views himself qualified to testify that the higher education in this country has become a copy of a communist education system: Under communism, every educator must be a communist in good standing, there are no exceptions; in this country, every educator must be a liberal in good standing, no exceptions.

Because of this, students in this country are forced to go through the same kind of ideological indoctrination as Petitioner did when he was their age, just to secure the minimum requirement for a decent job, a college diploma. As a result of the aforementioned discrimination and indoctrination, 87% of voters at the Stony Brook University voted for a Democratic presidential candidate in 2008 (Appendix C). This is on par with the election results commonly seen in communist countries.

It is unacceptable that the State of New York, or any other state, is required to defend

discrimination and uses taxpayers' money to do so. As is evident from the recent rejection of the Petitioner's application and from the Respondent's lack of interest in mediation, the higher education is totally committed to continue in this discrimination even after being fully exposed, and is unwilling and unable to change from within. Only outside intervention could lead to a meaningful reform that is essential to restore checks and balances, ethical and scholarly standards, honesty and credibility.

The universities must disclose the political make-up of their tenured faculty, must recognize that the absence of conservatives among their faculties is a problem, and take proactive measures to assure that the political orientation of tenured professors is more representative of the American society.

Petitioner also believes that he is one of the victims of a nation-wide conspiracy by the liberal elite to take over the control of public institutions, referred to as social revolution from within. This is being accomplished by discrimination in hiring against American citizens who are conservative, suspected of being conservative, or prefer to remain apolitical, and by persecution and purges of those hired. After taking complete control of these institutions, rules, regulations, laws, merit and evidence are selectively used and applied to benefit only liberals. The long-term goal is to turn conservative citizens into an underclass by denying them education, equal protection under

the law, and access to employment with decent wages.

The lower courts dismissed this case under the excuse that they lacked jurisdiction. Petitioner believes this Court has the jurisdiction to take the measures necessary to address his complaint in a meaningful way. This could also be the last opportunity for the judicial system to address this form of discrimination and corruption; there is no one coming in Petitioner's footsteps.

If this Court does not take the necessary measures, it is possible that the next Republican president would not be able to appoint a conservative judge to the Supreme Court, because there would not be any qualified conservative judges to appoint: the education system would simply refuse to educate them. If this Court does not act, the Petitioner would have to conclude that the chances for a victim of political persecution to reach justice in this country would be the same as in any communist country: exactly none.

No democratic society can tolerate secret, extra-judicial authorities that have virtually unlimited and unrestricted power, and the higher education in this country has become such authority. Wherefore, Petitioner prays this Court grants a Writ of Certiorari.

CONCLUSION

By the above-described actions, the lower courts denied the Petitioner:

1. Fair due process;
2. Impartiality;
3. Mediation;
4. Legal representation;
5. A day in court;
6. Justice.

WHEREFORE, Petitioner respectfully asks this Court to grant a Writ of Certiorari and, if so, would ask for judgment ordering the following:

1. To extend the stripping doctrine to state universities and colleges;
2. To reverse the summary judgments by the lower courts;
3. To remand this case for a fair and impartial trial before an unprejudiced jury;
4. To place the burden of proof on the Respondent;
5. To compel the Respondent to disclose the political orientation of its tenured faculty;
6. Any relief to the Petitioner that this Court finds proper and just.

Respectfully submitted,

Tibor Gasparik
Petitioner *Pro Se*, and
Research Associate Professor
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December 16, 2008

APPENDIX A: OPINION AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

TIBOR GASPARIK,

Plaintiff,

OPINION & ORDER

-against-

CV 05-3817(SJF)(ARL)

STONY BROOK UNIVERSITY,

Defendant.

----------x

FEUERSTEIN, J.

Before the Court is an application for the assignment of counsel and a general objection by plaintiff Tibor Gasparik (plaintiff) to a Report and Recommendation of United States Magistrate Judge Arlene R. Lindsay dated July 2, 2007 recommending that the motion of defendant Stony Brook University (defendant) for summary judgment be granted and the complaint be dismissed for lack of subject matter jurisdiction. For the reasons stated herein, the application for the appointment of counsel is denied, the Report and Recommendation is accepted in its entirety, summary judgment is

granted in favor of defendant and the complaint is dismissed.

1. Discussion

A. Appointment of Counsel

28 U.S.C. § 1915(e)(1) provides that a "court may request an attorney to represent any person unable to afford counsel." Courts possess broad discretion to determine whether appointment of counsel for civil litigants is appropriate, "subject to the requirement that it be 'guided by sound legal principle.'" Cooper v. A. Sargenti Co., Inc.. 877 F.2d 170, 171-72 (2d Cir. 1989) (quoting Jenkins v. Chemical Bank, 721 F.2d 876, 879 (2d Cir. 1983)).

When deciding whether to assign counsel to an indigent civil litigant under 28 U.S.C. § 1915(e)(1) the threshold inquiry is whether there is substance to the litigant's position. Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001): see also Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir. 1986) (holding that the district judge should first determine whether the indigent's position seems likely to be of substance). "[C]ounsel should not be appointed in a case where the merits of the indigent's claim are thin and his chances of prevailing are therefore poor." Carmona, 243 F.3d at 632.

If the Court finds that the plaintiff's claim is of substance, it should next consider the following factors:

> [T]he indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.

Hodge, 802 F.2d at 61-62; see also Carmona, 243 F. 3d at 632 (holding that only after an initial finding that a claim is likely one of substance should the court consider secondary factors such as the factual and legal complexity of the case, the ability of the litigant to navigate the legal minefield unassisted, and any other reason why in the particular case appointment of counsel would more probably lead to a just resolution of the dispute). However, these factors are not exclusive and "[e]ach case must be decided on its own facts." Hodge, 802 F.2d at 61.

The Court has reviewed plaintiff's application and finds that the appointment of counsel is not warranted at this stage of the litigation, since, *inter alia*, (1) plaintiff has not established that he is unable to afford counsel, merely indicating that he has "tried in vain to find a legal representative," (Plaintiff's Objection to the Report and Recommendation, dated July

5, 2007); and (2) plaintiff's position does not appear to be one of substance. Accordingly, plaintiff's application for the appointment of counsel is denied.

B. Standard of Review of Report and Recommendation

Rule 72 of the Federal Rules of Civil Procedure permits magistrate judges to conduct proceedings on dispositive pretrial matters without the consent of the parties. Fed.R.Civ.P. 72(b). Any portion of a report and recommendation on dispositive matters, to which a timely objection has been made, is reviewed *de novo*. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b). The court, however, is not required to review the factual findings or legal conclusions of the magistrate judge as to which no proper objections are interposed. See, Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Whether or not proper objections have been filed, the district judge may, after review, accept, reject, or modify any of the magistrate judge's findings or recommendations. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b).

Since plaintiff is *pro se* and filed a general objection, I conducted a *de novo* review of the Report and Recommendation. Upon such review, plaintiff's objection is overruled, the Report and Recommendation is accepted in its entirety, summary judgment is granted in favor of defendant and the complaint is dismissed for

lack of subject matter jurisdiction. The clerk of the Court is directed to close this case.

SO ORDERED

/s/

SANDRA J. FEUERSTEIN
United States District Judge

Dated: July 9, 2007
Central Islip, New York

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Attn: Lori L. Pack, AAG

JUDGEMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
TIBOR GASPARIK,

Plaintiff,

JUDGMENT

-against-

CV 05-3817 (SJF)(ARL)

STONY BROOK UNIVERSITY,

Defendant.

----------x

An Opinion and Order of Honorable Sandra J. Feuerstein United States District Judge, having been filed on July 9, 2007, adopting the Report and Recommendation of Magistrate Judge Arlene R. Lindsay dated July 2, 2007, and granting defendant's motion for summary judgment and dismissing plaintiff's complaint for lack of subject matter jurisdiction, it is

ORDERED AND ADJUDGED that plaintiff take nothing of defendant; the defendant's motion for summary judgment is granted; and that plaintiff's complaint is dismissed for lack of subject matter jurisdiction.

Dated: Central Islip, New York
July 9, 2007

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Lorraine Sapienza
Deputy Clerk

APPENDIX B: SUMMARY ORDER

EDNY (Central Islip)
05-cv-3817
Feuerstein (trj)
Lindsey (trj)

07-3398-cv
Gasparik v. Stony Brook University

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket

number of the case in which the order was entered. At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the sixteenth day of October, two thousand and eight.

PRESENT:

JON O. NEWMAN,
ROGER J. MINER,
JOSÉ A. CABRANES,

Circuit Judges.

----------x

TIBOR GASPARIK,

Plaintiff-Appellant,

v. No. 07-3398-cv

STONY BROOK UNIVERSITY,

Defendant-Appellee.

----------x

APPEARING FOR APPELLANT:
TIBOR GASPARIK, *pro se.*

APPEARING FOR APPELLEE:
CAROL FISCHER, Assistant Solicitor General, Of Counsel (Andrew M. Cuomo, Attorney General, Barbara D. Underwood, Solicitor General, Michael

S. Belohlavek, Senior Counsel, *on the brief*), Office of the New York State Attorney General, New York, NY.

Appeal from an order of the United States District Court for the Eastern District of New York (Sandra J. Feuerstein, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's appeal is DISMISSED.

Plaintiff-appellant Tibor Gasparik challenges a July 9, 2007 judgment of the District Court dismissing his complaint under 42 U.S.C. § 1983 against defendant-appellee Stony Brook University, a branch of the State University of New York ("SUNY"), for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The District Court adopted the July 7, 2007 Report and Recommendation of Magistrate Judge Arlene R. Lindsay, which found that Eleventh Amendment state sovereign immunity barred plaintiff's suit against SUNY in federal court. We assume the parties' familiarity with the facts and procedural history of the case.

We review *de novo* a district court's dismissal of a claim for lack of subject matter jurisdiction. *See Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007). Construing plaintiff's pleadings under "less stringent standards than formal pleadings drafted by lawyers," *Boykin v. KeyCorp.*, 521 F.3d 202, 214

(2d Cir. 2008) (internal quotation marks omitted), we find that the District Court properly concluded that it lacked subject matter jurisdiction because SUNY has not consented to be sued in a federal forum and so is immune from suit pursuant to the Eleventh Amendment. *See Dube v. State University of New York*, 900 F.2d 587, 594 (2d Cir. 1990) ("For Eleventh Amendment purposes, SUNY is an integral part of the government of the State [of New York] and when it is sued the State is the real party." (internal quotation marks omitted) (alterations in original)). Even if we were to read plaintiff's *pro se* pleadings as an effort to establish a claim for employment discrimination under Title VII of the Civil Rights Act, dismissal would be appropriate, as plaintiff failed to allege that he is a member of a class protected by the Act. *See* 42 U.S.C. § 2000e-2(a) (listing protected classes).

For the foregoing reasons, plaintiff's appeal is **DISMISSED**.

FOR THE COURT,

Catherine O'Hagan Wolfe, Clerk of Court

/s/

By_____

APPENDIX C: RESULTS FOR THE STONY BROOK UNIVERSITY PRESIDENTIAL ELECTIONS IN 2008

2008 Election **Results for Stony Brook – President**		
STATE UNIVERSITY @ STONY BROOK, 222 STUDENT ACTIVITIES CENTER, STONY BROOK		
Barack Obama (D)	1,809	87%
John McCain (R)	241	12%
Roger Calero (SW)	1	0%
Gloria La Riva (PSL)	1	0%
Cynthia McKinney (G)	5	0%
Bob Barr (L)	9	0%
Ralph Nader (I)	12	1%

Source:
http://longisland.newsday.com/elections/results2008.php?id=11794